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No. 02-132

IN THE

# Supreme Court of the United States

MOBIL CORPORATION and
HONEYWELL INTERNATIONAL INC.,

*Petitioners,*

*v.*

BRUCE W. ADKINS, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

## BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged have no connection at all to the state.

## CORPORATE DISCLOSURE STATEMENT

Respondent Union Carbide Corporation is wholly owned by The Dow Chemical Company ("TDCC"). TDCC has no parent companies, and no other publicly held company owns 10 percent or more of TDCC's stock.

Respondent Amchem Products, Inc. is no longer a separate corporate entity. Amchem Products, Inc.'s corporate successor is Aventis Crop Science USA Inc., which is wholly-owned by Bayer AG. Bayer AG has no parent companies, and no other publicly held company owns 10 percent or more of Bayer AG's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Corporate Disclosure Statement | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Statement of the Case | 1 |
| A. The "Mass Trial" Procedure | 2 |
| B. Union Carbide and Asbestos | 4 |
| C. Ramification of the "Mass Trial" Procedure for Union Carbide | 6 |
| Reasons for Granting the Writ | 8 |
| I. The West Virginia Court's Holding That Mass Aggregation For Trial Requires No Inquiry Into Commonality Or Potential Prejudice Violates Due Process | 10 |
| A. Current Mechanisms for Aggregation Adopt the Existence of Common Issues and the Avoidance of Prejudice as Due Process Touchstones | 11 |
| B. The Aggregation of Claims Historically Required the Existence of Common Issues and the Avoidance of Prejudice | 15 |

*Contents*


| | | *Page* |
|---|---|---|
| II. | The West Virginia Court's Choice-Of-Law Holding Conflicts With Decisions Of This Court And Violates Due Process ..... | 19 |
| | A. The Application of West Virginia Law to All Claims Violates Principles of Federalism and Due Process ..... | 19 |
| | B. A Conflict of Laws Does Exist Leading To a Violation of the Constitutional Limitations on Choice of Law and Horizontal Federalism ..... | 22 |
| | C. The Application of Multiple States' Laws in the Mass Trial Creates Jury Confusion and Violates Due Process .. | 27 |
| Conclusion ..... | | 30 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) ... 22

*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) ..... 13, 14, 17

*Andrews v. Spear*, 4 Dill. 470 (D. Minn. 1871) .... 18

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*Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir. 1970) ..... 12-13

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*Blanton v. Cooper Indus., Inc.*, 99 F. Supp. 2d 797 (E.D. Ky. 2000) ..... 24

*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) ..... 21

*Boddie v. Connecticut*, 401 U.S. 371 (1971) ..... 10

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| | Page |
|---|---|
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| *Celotex Corporation v. Copeland*, 471 So. 2d 533 (Fla. 1985) | 5 |
| *Comman v. Insurance Co.*, 1 Caines, 114, Cole & C. Cas. 188 (N.Y. 1803) | 17 |
| *Dangler v. Town of Whitestown*, 672 N.Y.S.2d 188 (4th Dep't 1998) | 27 |
| *Eisen v. Carlisle* 417 U.S. 156 (1974) | 17 |
| *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) | 21 |
| *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623 (E.D. Wisc. 1984) | 12 |
| *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. 1955) | 24 |
| *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973) | 11 |
| *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) | 14 |
| *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) | 28 |

*Cited Authorities*


| | Page |
|---|---|
| *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985) | 5 |
| *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954) | 7-8 |
| *Hansberry v. Lee*, 311 U.S. 32 (1940) | 16, 17 |
| *Harper v Virginia Dept. of Taxation*, 509 U.S. 86 (1993) | 8 |
| *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) | 9, 18-19 |
| *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) | 12 |
| *In re Asbestos & Asbestos Insulation Material Prods. Liability Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977) | 7, 13 |
| *In re Bridgestone/Firestone, Tires Prods. Liab. Litig. Appeals*, 288 F.3d 1012 (7th Cir. 2002) | 28, 29 |
| *In re Consol. Parlodel Litig.*, 182 F.R.D. 441 (D. N.J. 1998) | 11, 28 |
| *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) | 7 |
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*Page*

*Johnson v. BP Chemicals, Inc.*, 707 N.E.2d 1107 (Ohio 1999) ..... 25

*Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990) ..... 11

*Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933) ..... 18

*Keep v. R.R.*, 3 McCrary, 302, 10 F. 454 (D. Mo. 1882) ..... 18

*Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) ..... 21

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981) ..... 29

*Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) ..... 8, 11

*Mandolidis v Elkins Industries, Inc.*, 161 W. Va. 695 (W. Va. 1978) ..... 23

*Marlin v. Bill Rich Construction, Inc.*, 482 S.E.2d 620 (W. Va. 1996) ..... 26

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*Page*

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*Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986) ..... 27

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*Page*

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**United States Constitution:**

Fifth Amendment ..... 8, 29

Fourteenth Amendment ..... i, 8, 29

**State Constitutions:**

Ohio Constitution Art. 2 § 34 ..... 25

West Virginia Constitution Art. 3 § 17 ..... 10

**Statutes:**

Ky. Rev. Stat. § 342.610 ..... 24

Ky. Rev. Stat. § 342.690 ..... 24

Ohio Rev. Code § 2745.01 ..... 25

*Cited Authorities*


| | Page |
|---|---|
| 28 U.S.C. § 1407 | 13 |
| W. Va. Code § 23-4-2 | 3, 23, 24 |
| **Rules:** | |
| Fed. R. Civ. P. 20 | 12 |
| Fed. R. Civ. P. 23 | 13, 14 |
| Fed. R. Civ. P. 42 | 8, 11 |
| Supreme Court Rule 12(6) | 1 |
| W. Va. Trial Court Rule 26.01 | 2, 8 |
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## STATEMENT OF THE CASE

Union Carbide Corporation ("Union Carbide") and Amchem Products Inc. ("Amchem"), parties to the decision below in *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002) in the Supreme Court of Appeals of West Virginia, file this Brief in Support of the Petitioners' petition for a writ of certiorari pursuant to Supreme Court Rule 12(6). *See* App. F at 157a and 160a.

The Supreme Court of Appeals of West Virginia in *Gaughan* denied the Defendants' writ of prohibition/mandamus arising out of the Trial Scheduling Order ("TSO") dated February 26, 2002 that created a "Mass Trial"[1] for the resolution of approximately 8000 asbestos personal injury claims. *See* App. A at 3a.

A petition for a writ of certiorari was docketed by this Court on July 29, 2002. The Petitioners present two questions for this Court to consider. In relation to the first question the Petitioners argue that the consideration of the existence of common issues and a lack of prejudice is a requirement of due process that must be satisfied before an aggregation of claims can be permitted. The focus of Petitioners' arguments is the case law surrounding the prerequisites for consolidation. The second question implicates this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and the Petitioners argue that West Virginia cannot apply its law to the current aggregation of cases because many of those cases have an insufficient connection to the forum, leading to the violation of the defendants' due process rights and principals of federalism.

Union Carbide and Amchem file this Brief in Support for the purpose of joining in the arguments made by Petitioners in the petition for a writ of certiorari and for the additional purpose of arguing:

1. that all forms of aggregation of claims, regardless of whether such aggregation is referred to as a "consolidation" or

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1. The "Mass Trial" case was styled *In Re: Asbestos Litigation*, Civil Action No. 01-C-9000, Kanawha County.

by some other name, require a threshold inquiry into commonality and lack of prejudice to satisfy due process; and

2. in the "Mass Trial" context no choice of law analysis can pass muster under constitutional principals of due process because even if the Court applied the law of the numerous states that had significant contacts to the underlying causes of action, the trial would be unmanageable and confusing to the jury so as to violate the defendants' due process right to be given a meaningful opportunity to be heard.

The aggregation of asbestos-related cases into a mass trial in West Virginia simply cannot address the innumerable and diverse legal and factual issues raised by the approximately 8,000 plaintiffs' claims, and as a result, violates the due process rights of Union Carbide and Amchem[2].

**A. The "Mass Trial" Procedure**

The West Virginia Supreme Court enacted Trial Court Rule 26.01 ("Rule 26.01") in 1999. Rule 26.01 establishes a Mass Litigation Panel which is charged with the responsibility to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice." *See* App. C at 36a.

On February 26, 2002 Judge Gaughan, as a member of the Mass Litigation Panel, entered the TSO pursuant to Rule 26.01 which specified a trial date of September 23, 2002. The TSO sets out a procedure that requires the aggregation of all asbestos-related cases pending between the parties as of September 6, 2001. *See* App. B at 24a.

The procedure outlined in the TSO involves two stages:

Stage A — simultaneous mass trials to determine the fault or liability of defendants based upon whether the cause of action is a:

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2. Amchem is a party to this Brief in Support and joins in the arguments made by Union Carbide. The specific facts concerning Amchem will not be addressed in this brief due to the constraints of space.

1. product liability claim
2. premises liability claim[3]
3. claim by an employee against their employer under the provisions of W. Va. Code § 23-4-2[4].

Stage B – mini-trials to determine causation and damages. *See* App. B at 25a-29a. Order II.A and A.7.

The juries in stage A will "determine the common issues of fault." *See* App. B at 26a-27a. Order II.A.1, 2 and 3. The Trial Order does not specify what those common issues are. The juries hearing the product and premises liability claims will also determine if the defendants' conduct warrants the awarding of punitive damages. *See* App. B at 26a. Order II.A.

The TSO proposes to impanel new juries for stage B. The number of plaintiffs per mini-trial is not specified. How the plaintiffs will be grouped is explained as "manageable groups based on causes of action, geographic locations, and similar exposure criteria." *See* App. B at 28a. Order II.A.7. The number of mini-trials to be held is not specified but the Trial Order reserves for consideration a "matrix constructed from actual jury verdicts" as a means for extrapolating those jury verdicts to plaintiffs not subject to a mini-trial to ensure plaintiffs will not be denied their right to justice without excessive delay. *See* App. B at 28a-29a. Order II.B. and C.

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3. This cause of action refers to the liability of the owner of premises that had asbestos-containing materials in them and with which the plaintiffs had contact for some business purpose, such as abatement or the construction of facilities.

4. This cause of action refers to the intentional infliction of harm exception to a Workers' Compensation scheme. The exception exists because certain conduct by an employer towards an employee is beyond the scope of the employment relationship such that the parties cease to be employee and employer and become intentional tortfeasor and victim. At a hearing on August 12, 2002, the Mass Litigation Panel (Judges Recht, Stephens and Moats presiding) indicated that this part of the "Mass Trial" would be rescheduled to December 2, 2002.

**B. Union Carbide and Asbestos**

To allow the Court to see the actual effect of the "Mass Trial" this Brief illustrates its arguments through reference to some of Union Carbide's involvement with asbestos that is the subject of the TSO. Union Carbide mined and milled a unique short form of chrysotile asbestos, known as "Calidria" from about 1963 to 1985. Union Carbide also used non-Calidria asbestos products manufactured by companies other than Union Carbide in its chemical plants located in West Virginia, Kentucky and Ohio that were handled by Union Carbide's employees as well as by numerous contractors' employees.

Union Carbide's operations have led to claims against it in all three of the proposed mass trials in Phase A. The mining and milling activities have led to Union Carbide being named in product liability suits. The chemical plant operations have resulted in suits from contractors' employees based on a premises liability theory. The statutory "intentional infliction of harm" exception to Workers' Compensation schemes has resulted in suits by Union Carbide employees.

The diverse types of asbestos, uses of asbestos, medical effects and forms of exposure to asbestos at issue in the case are aggregated so as to collapse not only the differences that exist within Union Carbide's operations, but also the differences between Union Carbide and the hundreds of other defendants.

**(a) Product Liability Claims**

"Calidria" asbestos is short grade fiber that was produced in small volumes and used in a limited number of applications. Calidria has been used as a filler, reinforcing agent, opacifier, and thickening agent in such products as drywall patching compounds, plastics, and paints. At trial Union Carbide would argue that Calidria's unique physical characteristics and chemical composition means that it does not cause asbestos-related disease. See E. Ilgren and E. Chatfield, *Coalinga-Fibre — A Short, Amphibole-Free Chrysotile: Part 1: Evidence For A Lack Of Fibrogenic Activity*, Indoor Built Environ., 6:264-276 (1997), E. Ilgren and E. Chatfield, *Coalinga Fibre — A Short, Amphibole-Free Chrysotile: Part 2: Evidence For A Lack Of*

*Tumourigenic Activity*, Indoor Built Environ., 7:18-31 (1997); E. Ilgren and E. Chatfield, *Coalinga Fibre — A Short, Amphibole-Free Chrysotile: Part 3: Lack of Biopersistence*, Indoor Built Environ., 7:98-109 (1998).

The other defendants included in the "Mass Trial" are an assortment of companies that manufactured a range of dissimilar products such as gaskets, automotive friction products, mastic products, cement shingles and boards, pipe insulation, block insulation, adhesives, joint compounds, and insulation cements. *See generally Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 578 (1983) ("Today more than three thousand products commonly found in the home and work environments contain asbestos.").

Moreover, the products at issue contained entirely different types of asbestos fibers such as amosite, crocidolite, tremolite, tremolite contaminated chrysotile or chrysotile asbestos, which have significantly different physical characteristics and thus pose significantly different risks in the development of human disease. *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985), ("[A]ll asbestos-containing products cannot be lumped together."); *accord Celotex Corporation v. Copeland*, 471 So.2d 533, 538 (Fla. 1985) and *Becker v. Baron Bros. Coliseum Auto Parts*, 649 A.2d 613, 621 (N.J. 1994) ("[A]sbestos products are not made from the same formula, come in various forms and carry different risks of harm.") (citations omitted).

**(b) Premises Liability and Intentional Infliction of Harm Claims**

Union Carbide operated five plants within West Virginia and at least two outside of West Virginia that are implicated in the "Mass Trial". In West Virginia Union Carbide operated plants at various different times at South Charleston, Institute, Alloy, Tech Center and Sistersville. The identified premises outside of West Virginia were located at Paducah, Kentucky and Marietta, Ohio. The asbestos products used at each location, warnings on those products, types and availability of protection,

the historical response to the inclusion and/or removal of asbestos from the premises, the work conducted and whether it was conducted by employees or contractors varied. In addition these factors also varied in comparison with other defendants.

The plaintiffs whose cases are subject to the TSO were members of a bewildering variety of different trades, that include boilermakers, insulators, carpenters, iron workers, laborers, roofers, painters, equipment operators, mechanics, electricians, cement masons, chemical plant operators, and steelworkers, to name but a few. Additionally, other plaintiffs make claims based solely on household exposure. Each plaintiff has a unique claim regarding asbestos exposure, which allegedly occurred at different times, in different locations, for different durations and under different exposure conditions.

Moreover, there are tremendous differences in the asserted injuries among the plaintiffs. The differences between each of the plaintiffs is compounded by the fact that many plaintiffs suffer from medical conditions unrelated to asbestos exposure. Among those differences are the varying exposure times recognized by medical science as necessary in order to cause or contribute to the plaintiffs' alleged injuries. The cases subject to the TSO present a variety of medical complaints including but not limited to asbestosis, in various degrees of severity ranging from no practical impairment[5] to advanced pulmonary fibrosis; pleural changes only; bronchogenic carcinoma; and mesothelioma.

### C. Ramification of the "Mass Trial" Procedure for Union Carbide

To ascertain liability of a defendant and the relief, if any, to which a plaintiff is entitled requires the resolution of the following issues for each and every case:

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5. Based on historical experience in asbestos litigation and the partially complete Plaintiffs' Certifications required under the TSO (*see* App. B at 30a), Union Carbide believes that many of the thousands of cases subject to the TSO involve unimpaired plaintiffs with pleural changes only.

- the precise product(s) to which the plaintiff was exposed;
- the manner, conditions, and circumstances of each exposure;
- the dates, duration and location of each exposure;
- the manner in which each alleged asbestos containing product was used;
- whether there was protective equipment available and actually used;
- the presence or absence of warnings included with the specific product(s) at issue;
- the injury sustained by the particular plaintiff; and
- each plaintiff's medical, family, and personal history, including such issues as other causes of the plaintiff's injury such as use of tobacco products, and other occupational exposures to different substances (e.g., benzene, carbon tetrachloride, coal dust).

*See In re Asbestos & Asbestos Insulation Material Prods. Liability Litig.*, 431 F. Supp. 906, 909-910 (J.P.M.L. 1977); *In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir. 1990); and *Gaughan*, 563 S.E.2d at 428 (Maynard J. concurring).

The TSO's requirement that juries in stage A will "determine the common issues of fault" ignores the need to determine the above issues, disregards the complete lack of common issues and severely prejudices parties by effectively eliminating the ability of the defendants to present a defense. By way of example, Union Carbide is unable to present evidence relating to its unique product "Calidria" or present evidence about the industrial hygiene practices it adopted in the Polyolefins Unit at the Institute Plant in Charleston, West Virginia, without such evidence being entangled with the cases of the other 100 or so defendants. Likewise, other defendants' ability to maintain their individual defenses is lost in the morass of details that are necessary to explain corporate, premises and individual job conduct.

Evidence concerning the alleged knowledge and conduct of all defendants will be admitted into the mass proceeding, where it will almost inevitably taint Union Carbide, as well. *See Gwathmey v. United States*, 215 F.2d 148, 154 (5th Cir.

1954) (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). In addition the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the jury, making it impossible to distinguish one defendant or defense from another. *See Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).

**REASONS FOR GRANTING THE WRIT**

In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. State courts must provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights. *See* U.S. CONST. 5th and 14th Amendments; *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 102 (1993); *California v. Ramos*, 463 U.S. 992, 1013-1014 (1983). As a result, West Virginia's Rule 26.01 and the TSO must be consistent with the protections of the United States Constitution to be valid. In this instance the West Virginia court has exerted its powers to deprive the defendants of their rights to due process.

The Petitioners' petition for a writ of certiorari convincingly argues that the due process standards governing the consolidation of cases should apply to the West Virginia Mass Trial procedure under Rule 26.01 and the application of such standards do not permit the proposed "Mass Trial." In addition to the reasons for granting the writ of certiorari set forth in the Petitioners' petition, which Union Carbide and Amchem fully join, it is also asserted that the writ of certiorari should be granted because the aggregation of claims, regardless of whether it is termed a consolidation, is required to conform to the requirements of commonality and a lack of prejudice.

Indeed as addressed below, aggregation under a class action, permissive joinder, multi-district consolidation, and consolidation under Federal Rule of Civil Procedure 42 all include an examination of commonality and prejudice.

In addition, as demonstrated below, the requirements of commonality and a lack of prejudice have deep historical roots, embedded in the judicial milieu that informs how justice is to be rendered. Indeed, "this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see also Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due'") (emphasis in original).

The petition for a writ of certiorari should also be granted for the reasons advanced by the Petitioners that the West Virginia Supreme Court of Appeal's disregard for this Court's decision in *Shutts*, 472 U.S. 797 does violence to the principles of *stare decisis*, federalism and due process rights[6]. As the *Shutts* decision prohibits, there is a conflict between the forum law and that of the other jurisdictions connected to the suit resulting in an injury to the defendants, and consequently a violation of the constitutional limitations on choice of law. *Id.* at 816.

This Brief in Support addresses the conflict issue through an examination of the varying laws of the implicated jurisdictions on the intentional infliction of harm exception to Workers' Compensation laws and on the ability of unimpaired plaintiffs to recover compensation. While demonstrating a clear conflict in choice of law terms and therefore a violation of due process, the analysis also starkly highlights the way in which West Virginia presumptuously disregards the sovereign rights of other states and the principal of horizontal federalism.

Further, no choice of law analysis can protect due process rights in the "Mass Trial" because even if the trial court respected *Shutts* and applied the law of the states that had significant contacts, then the laws of the numerous states implicated in the case will render the trial unmanageable, confusing to the jury and ultimately a violation of the defendants' due process right

6. At a hearing on August 12, 2002, the Mass Litigation Panel (Judges Recht, Stephens and Moats presiding), stated that West Virginia law would be applied to all claims in the "Mass Trial".

to be given a meaningful opportunity to be heard and to mount a defense.

## I. THE WEST VIRGINIA COURT'S HOLDING THAT MASS AGGREGATION FOR TRIAL REQUIRES NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE VIOLATES DUE PROCESS

The Due Process Clause requires that everyone shall have the protection of their day in court and the benefit of the general law, which hears before it condemns and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). *See also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend.'") (citations omitted). An aggregation of cases does not *per se* violate the requirement of due process. However, any form of aggregation must honor a party's right to due process so as not to run afoul of the United States Constitution.

Due process is afforded in the aggregation of cases context by ensuring the existence of common issues and the avoidance of prejudice. This due process formula may be gleaned from a review of current mechanisms for aggregation and by reference to historical practice.

In striking contrast, the Supreme Court of Appeals of West Virginia's opinion in *Gaughan* does not require the trial court to inquire into the commonality of the aggregated claims or the possible prejudice to the parties that would result from aggregation. *See* App. A at 13a. The trial court is relieved of these duties because there is a need for "significant flexibility and leeway" in dealing with asbestos litigation, as well as the "constitutional mandate of administering justice without delay[7]."

7. The West Virginia Constitution Art. III § 17 provides "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

*See* App. A at 11a-12a. While efficiency and justice without delay are important goals they cannot be achieved at the expense of due process.

### A. Current Mechanisms for Aggregation Adopt the Existence of Common Issues and the Avoidance of Prejudice as Due Process Touchstones

A court can aggregate claims through various methods, such as, class action, permissive joinder, multi-district consolidation, and consolidation under Federal Rule of Civil Procedure 42 equivalents. *See* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 182 (2001) ("[I]n the United States, there are a variety of devices for pursuing large-scale litigation."). Although each method's goal is to increase efficiency, every method also requires an inquiry into commonality and prejudice, regardless of whether one claim is to be joined under permissive joinder or 1000 claims are to be certified as a class.

#### (a) Consolidation

For a consolidation under Fed. R. Civ. P. 42(a), a common question of law or fact shared by all of the cases is a prerequisite. However, "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). "The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350. In addition courts' have the discretion to order separate trials to avoid prejudice. *See* Fed. R. Civ. P. 42(b). "The court's power to sever claims and order separate trials [requires] it to balance the factors of benefit and prejudice that will result from the alternative courses." *Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973).

Trial courts have conducted the efficiency and prejudice balancing analysis in considering consolidations and will reject consolidation where a party's rights are prejudiced. *See In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 444 (D. N.J. 1998) (The court must weigh "the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice.")

(citations omitted); *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623, 625 (E.D. Wisc. 1984) (Even though there was clearly a commonality of legal issues, factual dissimilarities and the "strong possibility of confusing the jurors" cautioned against trying all of the cases in a single proceeding.); *Webb v. Goord*, 197 F.R.D. 98, 101 (S.D.N.Y. 2000) ("Combining into a single action unrelated incidents involving distinct events and disparate parties also carries the potential of confusing a jury and of exposing some defendants to the risk of liability by loose institutional association for the unconnected wrongdoing of others."). *See also* 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2383 (West 2d ed. 1995).

In general, consolidation has not been favored in the mass tort context. Consolidation is regarded as unwarranted because:

> Individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

*In re Northern Dist. of Cal. Dalkon Shield Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982). *See also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996).

**(b) Permissive Joinder**

Plaintiffs' cases can be properly joined under Fed. R. Civ. P. 20(a) if: (1) there is a right to relief arising out of the same transaction or occurrence, and (2) there is a question of law or fact common to all the plaintiffs. But, as with other aggregation procedures, the two commonality requirements must be consistent and balanced with fairness to the parties. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 n.10 (1966) (*superceded on other grounds by statute*). *See also Barr Rubber*

*Products Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1126-27 (2d Cir. 1970) ("Rule 20 . . . specifically vests in the district court the discretionary power to make such orders as may be required to prevent delay or prejudice"); *Arrington v. City of Fairfield*, 414 F.2d 687, 693 (5th Cir. 1969).

**(c) Multidistrict Litigation**

Multi-districting is a statutory-based procedure that allows parties to request the Judicial Panel on Multidistrict Litigation to collect lawsuits arising out of the same or similar circumstances that have been filed in different federal courts and transfer them to a single court for purposes of pretrial proceedings. *See* 28 U.S.C. § 1407. The transfer has to serve the convenience of the parties and witnesses, as well as further the just and efficient conduct of the litigation. *Id. In re Asbestos & Asbestos Insulation Material*, 431 F. Supp. 906 rejected the consolidation of 103 actions based on exposure to asbestos dust because "the circumstances of exposure are predominantly individual to each action" and a finding that "transfer would not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation." *Id.* at 909-910.

**(d) Class Actions**

Class actions pursuant to Federal Rule of Civil Procedure 23 must satisfy four prerequisites: numerosity, commonality, typicality and adequate representation. Fed. R. Civ. P. 23(a). The rule clearly requires commonality but in addition protects against prejudice through the commonality, typicality and adequacy of representation requirements.

Many courts have rejected the feasibility of consolidating asbestos and similar products-liability cases into a Rule 23 class action. One notable example is *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), upholding an appellate court's decision to decertify an asbestos class intended to achieve a global settlement of current and future asbestos-related claims nationwide. The Supreme Court cautioned that aggregated treatment of asbestos cases is improper when "individual stakes are high and disparities among class members great." *Id.* at 625.

In upholding decertification, the Court explained the purpose behind a number of the class action prerequisites, such as that "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Further, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625. Most importantly for the current analysis this Court also observed:

> The adequacy-of-representation requirement "tends to merge" with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

*Id.* at 626 n.20 citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982). *See also Amchem*, 521 U.S. at 615 where this Court explained that the predominance and superiority requirements of Rule 23(b)(3) are intended to achieve efficiencies "without sacrificing procedural fairness or bringing about other undesirable results."

The merger of prerequisites identified by this Court exists because the *sine qua non* of the adequacy of representation, commonality and typicality criteria of Rule 23(a) is the avoidance of prejudice. As the class action necessarily involves absent class members being subject to the *res judicata* effect of the Court's decision, the rules direct attention to ways in which the avoidance of prejudice can be satisfied — the guideposts.

All of the current forms of aggregation require an inquiry into commonality and prejudice. To disregard this inquiry is to dispense a "cattle-car" justice which disenfranchises all parties and renders inaccurate judgments. *See* Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 Def. Couns. J. 18 (1996). Wherever the floor of

acceptable practices to satisfy due process is, the unlimited mass consolidation given effect by the TSO falls below it. Moreover, as the inquiry must be conducted at the outset, before the trial is commenced, it is appropriate for the Court to grant certiorari now.

### B. The Aggregation of Claims Historically Required the Existence of Common Issues and the Avoidance of Prejudice

Anglo-American judicial systems have long favored individual control over litigation. Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L .Rev. 69, 74 (1986). However, at some point individualized justice becomes inefficient leading to the observation that "[w]hat group litigation has been searching for since the late seventeenth century is an understanding of which cases call for this sort of inefficiency." Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 691 (1997). This question has driven current and historical analysis of the class action.

The history of group litigation demonstrates that Equity has always required an assurance of commonality and lack of prejudice. Stephen C. Yeazell, who has written extensively on the history of group litigation, asks the question "what cohesion, transactions, or likenesses will justify one person's representing another in litigation — [what] will qualify a group as a litigative entity?" Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 U.C.L.A. L. Rev. 514, 515 (1980) [hereinafter Yeazell, *From Group Litigation*]. According to Yeazell, group litigation historically required "the actual cohesion of a social group as its basis, then a looser series of transactions among the members of the group, and finally only the sharing of some abstractly defined common interest among the members of the class." *Id.* As the nature of litigation changed with society over the centuries, the courts had to be satisfied with the existence of commonality in different ways.

The chancellors of medieval England did not inquire into issues such as adequate representation, conflict, or binding adjudication when faced with a possible group litigation situation. The "groups of group litigation [were] social entities rather than mere litigative units." Yeazell, *From Group Litigation* at 516. The groups were not formed only for the purpose of litigation, and the size and geographical proximity of the members made it possible to obtain actual consent, so that the chancellors had assurance that commonality would be present and that there would be a lack of prejudice.

As the 'natural groupings' of manorial tenants and parishioners broke down during the course of the 18th and 19th centuries they were replaced by associations "that often touched much narrower portions of their members' lives." Yeazell, *From Group Litigation* at 523. Commonality and prevention of prejudice were achieved through an alignment of interests, the courts sought congruence between the represented parties' interests and those of the representative as the guarantee for effective representation. *Id.* at 522 and 550-552.

Group litigation emigrated to America in the 1820's. Although the doctrinal underpinnings of the early class action were unclear, the Supreme Court in *Smith v. Swormstedt*, 57 U.S. 288 (1850) observed that "care must be taken that persons are brought on the record fairly representing the interest or right involved" and that where the subject matter of the suit is common to the parties then their interests will be protected. *Id.* at 303. An approach which was followed in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921). *See* Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, 221-222 and 225-226 (Yale University Press 1987).

The requirement of an alignment of interests between the representative and the absent parties was "constitutionalized" in the Supreme Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), that held that adequate representation of interests was necessary to meet constitutional due process requirements

for binding nonparties. *Id.* at 45. *See also* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L. Rev. 213, 225 (1990).

The historical development of group litigation demonstrates that prejudice was avoided firstly through consent and then througn an alignment of interests which today's lawyers know as adequacy of representation. Aggregation of cases through joinder and consolidation achieve due process through references to avoiding prejudice and achieving fairness. The modern class action adopts a more refined approach to due process by providing guidance on how prejudice is eliminated through requirements such as notice, (*Eisen v. Carlisle*, 417 U.S. 156, 174-175 (1974)), the right to opt-out (*Shutts*, 472 U.S. at 812[8]) and adequate representation (*Hansberry*, 311 U.S. at 42-43 and *Amchem* as explained above).

The history of consolidation seems to be somewhat briefer than that for the class action. Justice Gray found the roots of "the consolidation rule" in England where Lord Mansfield devised the practice of allowing the trial of a multiplicity of actions upon the same question under different policies of insurance. Where those prerequisites were present all but one of the trials were stayed, with the several insurers bound by the verdict in that trial. *See Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 292-293 (1892). The English practice was followed in New York until a statute governing consolidations was passed. *See Comman v. Insurance Co.*, 1 Caines, 114, Cole & C. Cas. 188 (N.Y. 1803); *Thompson v. Shepherd*, 9 Johns. 262 (N.Y. 1812). In other American courts a consolidation was achieved through ordering several actions by one plaintiff against different defendants to be tried together whenever the defense was the same, and unnecessary delay and expense would be avoided. *See Hillmon*, 145 U.S. at 292-293

8. The Supreme Court's decision was limited to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." *See Shutts*, 472 U.S. at 812 n.3.

(citing *Witherlee v. Ins. Co.*, 24 Pick. 67 (N.Y. 1830); *Wiede v. Ins. Cos.*, 3 Chi. Leg. N. 353 (D. Minn. 1871); *Andrews v. Spear*, 4 Dill. 470 (D. Minn. 1871); and *Keep v. R.R.*, 3 McCrary 302, 10 F. 454 (D. Mo. 1882)).

Justice Gray then explained "no defendant could be deprived, without its consent, of any right material to its defense." *See Hillmon*, 145 U.S. at 293. In *Hillmon* the defendants were denied there right to individually have three peremptory jury challenges as provided by statute so that they were entitled to a new trial.

In *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933). *Hillmon* was followed in setting out the following rule "consolidation is permitted as a matter of convenience and economy in administration, but does not . . . change the rights of the parties." *Id.* at 496- 497.

The historical analysis of consolidation above demonstrates that there must be commonality which was predicated on the existence of the 'same defense' or 'same question', and the parties must not be prejudiced, that is, their rights may not be deprived or changed as a result of the consolidation.

The courts in conducting class actions and consolidations have not done so purely out of convenience and economy. Efficiency was achieved by, and balanced with, an inquiry into the commonality of the claims and the potential for prejudice. The "Mass Trial" has been approved by the West Virginia Supreme Court of Appeals without an inquiry which courts have routinely conducted for centuries. The TSO robs the defendants of the ability to adequately and meaningfully present their case so as to raise available defenses. This denial occurs because the TSO subsumes the numerous factors upon which one plaintiff's claim may differ from another plaintiff's claim thus ignoring the existence of a complex factual matrix with interlocking and dependent issues.

This Court has stated that "When the absent [common law] procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Oberg*, 512 U.S. at

430. The petition for certiorari should be granted to ensure the protection of the parties' long standing historical rights and prevent the violation of due process through capricious adjudication.

## II. THE WEST VIRGINIA COURT'S CHOICE-OF-LAW HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND VIOLATES DUE PROCESS

The Supreme Court of Appeals of West Virginia's decision on the substantive law to be applied in the "Mass Trial" can be interpreted in one of two ways: either the trial court should apply West Virginia law to all claims or the trial court should apply West Virginia choice of law rules[8]. *See* App. A at 7a and 21a-22a. Either reading suffers from an inherent constitutional infirmity.

The first approach violates this Court's decision in *Shutts*, which includes principles of federalism and due process. The second reading involves the application of the doctrine of *lex loci delicti* so that numerous other states' laws must be applied leading to inevitable jury confusion and the violation of the defendants' due process right to be given a meaningful opportunity to be heard and to mount a defense. In the "Mass Trial" context no choice of law analysis can pass muster under constitutional principals of due process.

### A. The Application of West Virginia Law to All Claims Violates Principles of Federalism and Due Process

The Supreme Court of Appeals of West Virginia's decision allowing the trial court to apply West Virginia law to all claims violates *Shutts*, due process, and horizontal federalism.

Choice of law in the United States is inherently constitutional law. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250 (1992) (citing Justice Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 2, 6-7 (1945)). Choice of law questions are concerned with the allocation of

authority among the several states. *Id.* The allocation of authority among the several states inevitably causes federalism questions to arise. John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 Seton Hall L. Rev. 698, 706 (2001). Federalism has two dimensions, one vertical and one horizontal. *Id.* Vertical federalism refers to the conflict and relationship between state law and federal law. Horizontal federalism involves the relationships between and among the several states. *Id.* Various constitutional provisions seek to protect horizontal federalism — the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the Extradition Clause. *Id.*

In *Shutts* this Court recognized the importance of horizontal federalism to choice of law when the Court held that the application of Kansas law to every claim in a class action suit where almost all the plaintiffs had no apparent connection to Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822. The Court stated that the constitutional limits on choice of law are not "altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the state proposes to adjudicate and which have little connection with the forum." *Id.* at 821. West Virginia's decision to do otherwise and apply its own law to every claim in the present matter regardless of the connection to West Virginia violates such constitutional limitations and threatens horizontal federalism.

The *Shutts* decision is an attempt to prevent forum shopping and interference with other states' sovereignty. Without *Shutts*, a state with an insubstantial interest in a dispute can bind the nation, unfairly resolving controversial issues for the rest of the nation. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 57-59 (1986) [hereinafter Miller & Crump, *Jurisdiction and Choice of Law*]. This Court has consistently recognized the importance of preventing one state from imposing its own policy choice on neighboring states.

*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571-572 (1996). *See also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular."); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

The invasion of a state's sovereignty may arise from another state's legislation, federal legislation, a federal court, or another state's court. *See, e.g., Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941) ("lack of uniformity . . . is attributable to our federal system, . . . [and a state's] right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law".") In this case, it is the West Virginia court rather than a federal court that is threatening to thwart the local policies of numerous states, but that difference is irrelevant for purposes of protecting federalism.

*Shutts* attempts to prevent forum shopping on the horizontal federalism level.[9] *Shutts*' efforts will be seriously undermined if the West Virginia court is allowed to apply its state's law to all claims, regardless of the interest of the state in such claims. *See* Miller & Crump, *Jurisdiction and Choice of Law*, at 62 n.426 ("Given the jurisdictional holding of *Shutts*, choice of law is the principal protection of interstate federalism.").

From a due process perspective, for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. *Shutts*, 472 U.S.

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9. This Court's decisions in the seminal cases *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co.*, 313 U.S. 487 were designed to prevent forum shopping by plaintiffs on a vertical federalism level.

at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

The West Virginia Supreme Court has acknowledged the existence of no connection between as many as five thousand plaintiffs and West Virginia. *See* App. A at 21a-22a (Maynard J. concurring). The West Virginia Supreme Court's failure to engage in a "significant contacts" analysis means that Union Carbide is now required to defend cases arising from actions occurring at premises in, and subject to the laws of, Kentucky and Ohio, under the different laws of West Virginia.

In *Shutts* this Court stated that "[w]hen considering fairness in this context, an important element is the expectation of the parties." *Shutts*, 472 U.S. at 822. When Union Carbide operated its premises in Paducah, Kentucky and Marietta, Ohio it did so pursuant to the laws of those states, including the Workers' Compensation laws. It is fundamentally unfair that actions taken by Union Carbide in reliance upon the law governing it are now to be disregarded and Union Carbide's actions are to be judged against the differing standards of West Virginia law. Examples of those differing standards are set out below.

West Virginia cannot be allowed to impose its law, in violation of *Shutts*, on all of the plaintiffs' claims because such an imposition would be fundamentally unfair and violate both the due process rights of the parties to this litigation and the sovereignty of the various other states with direct interests in the pending action.

**B. A Conflict of Laws Does Exist Leading To a Violation of the Constitutional Limitations on Choice of Law and Horizontal Federalism**

The *Shutts* decision requires that there be a conflict between the forum law and that of the other jurisdictions connected to the suit for there to be an injury, and consequently a violation of the constitutional limitations on choice of law. *Id.* at 816.

The plaintiffs have commenced actions in West Virginia where the place of the alleged tort was Ohio, Pennsylvania, Kentucky, Virginia, Indiana, or New York, to name the most

prevalent non-West Virginia locations. A review of those states' laws on the "deliberate intent" exception to Workers' Compensation and unimpaired plaintiffs demonstrates that the applicable substantive laws vary widely and lead to vastly different outcomes.

**(a) "Deliberate Intent" Exception to Statutory Scheme of Workers' Compensation**

The different ways in which the "deliberate intent" exception operates across states can be illustrated by focusing on the three states where Union Carbide operated facilities and employed people to run those facilities, West Virginia, Ohio and Kentucky

The TSO envisages only applying West Virginia law to "deliberate intent" exception causes of actions. *See* App. A at 7a and App. B at 25a referring to the third trial group being for claims under W. Va. Code § 23-4-2. West Virginia law allows an employee to pursue compensation under the Workers' Compensation scheme and to also bring an action pursuant to the deliberate intent exception. W. Va. Code § 23-4-2(b). West Virginia law provides two alternative tests that an employee in West Virginia can meet to demonstrate his employer's "deliberate intent" to injure him and so strip the employer of statutory immunity from a tort suit[10]. The statutory tests are:

1. The injured employee shows that his employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury" — merely willful, wanton or reckless misconduct will not suffice (W. Va. Code § 23-4-2(c)(2)(i)); or

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10. West Virginia enacted the statutory definition of "deliberate intent" in 1983 to override the West Virginia Supreme Court's decision in *Mandolidis v Elkins Industries, Inc.*, 161 W.Va. 695 (W. Va. 1978). *Mandolidis* liberalized what had previously been a narrow construction of deliberate intent. As a result, even applying only West Virginia law, a jury will need to be instructed on different standards of 'deliberate intent' depending upon when the plaintiff was exposed to asbestos.

2. The injured employee satisfies a fact-specific five-part test to demonstrate an unsafe working condition to establish his employer's deliberate intent to injure, by proving:

1. existence of a specific unsafe working condition presenting a high degree of risk and serious injury or death;
2. that the employer had a subjective realization of the existence of the unsafe working condition and of the high degree of risk and serious injury or death;
3. that the unsafe working condition was a violation of a state or federal safety statute, rule or regulation, or of a commonly accepted and well-known safety standard within the industry or business of such employer;
4. that the employer nevertheless exposed the employee to such specific unsafe working condition intentionally; and
5. the employee suffered serious injury or death as a direct and proximate result of such specific unsafe working condition. (W. Va. Code § 23-4-2(c)(2)(ii)).

In contrast, Kentucky adopts the position that an injured employee must elect between his remedies; "if he chooses to sue . . . he waives any recovery under the workers' compensation laws and if he chooses to make a claim under the workers' compensation laws, he waives his cause of action at common law." *Blanton v. Cooper Indus., Inc.*, 99 F. Supp. 2d 797, 803-804 (E.D. Ky. 2000) and Ky. Rev. Stat. § 342.610(4). The only exception to the election requirement is where the injury or death results from "willful and unprovoked physical aggression" by an employee, officer or director. Ky. Rev. Stat. § 342.690(1). Further Kentucky law defines deliberate intent as "the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent." *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25, 27 (Ky. 1955) and applied in *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 535-536 (6th Cir. 1999).

A comparison of Kentucky and West Virginia law quickly reveals that they differ as to the need to elect between remedies and that West Virginia's five-part test provides an additional avenue for plaintiffs to recover that does not exist in Kentucky. The impact on a Kentucky premises owner such as Union Carbide is that while it believed it had dealt with its liability to employees who had accepted compensation under the Kentucky statute, it now finds that those workers by filing their actions in West Virginia have evaded Kentucky's legislative mandate and are seeking further compensation.

The egregious nature of West Virginia's attempts to override the sovereignty of other states is starkly illustrated by a comparison with Ohio. Former Ohio Rev. Code § 2745.01 purported to replace the common law cause of action for intentional employer tort in Ohio with a statutory scheme that required proof by "clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort." However, the Ohio Supreme Court invalidated § 2745.01 as in violation of the Ohio Constitution Art. 2 § 34[11]. *Johnson v. BP Chemicals, Inc.*, 707 N.E.2d 1107, 1115 (Ohio 1999). The Ohio Supreme Court's decision is part of a larger struggle between the Ohio legislature and judiciary as to what standards of conduct and proof are constitutionally permissible in the area of the "deliberate intent" exception to Ohio's Workers' Compensation scheme. *See* Marc A. Claybon, *Ohio's "Employment Intentional Tort": A Workers' Compensation Exception, or the Creation of an Entirely New Cause of Action?*, 44 Clev. St. L. Rev. 381 (1996). Ohio's ongoing debate is of central importance to how Ohio wishes to govern an important aspect of its citizens' rights. West Virginia's "Mass Trial" makes no attempt to accommodate other states' "deliberate intent" exception laws so that it undermines the

11. Ohio Constitution Art. 2 § 34 provides: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

important requirement of horizontal federalism that is intrinsic to the operation of the United States' form of government. In relation to Ohio, not only are its laws being disregarded, but the interpretation of its Constitution is being ignored. The ongoing debate in Ohio is rendered moot by West Virginia allowing Ohio citizens who worked at an Ohio plant to bring action in West Virginia Courts that will solely apply West Virginia law.

**(b) Unimpaired Plaintiffs**

In West Virginia "an individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." *See Marlin v. Bill Rich Construction, Inc.*, 482 S.E.2d 620, 637 (W. Va. 1996) (citing *Ricottilli v. Summersville Memorial Hospital*, 425 S.E.2d 629, 630 (W. Va. 1992)). In order to ensure the emotional distress is "real and serious", the plaintiff has to prove that he or she was actually exposed to the disease by the negligent conduct of the defendant, the plaintiff's emotional distress is foreseeable, and the plaintiff actually suffered serious emotional distress as a direct result of the exposure. *Marlin*, 482 S.E.2d at 638.

In direct contrast, other states either do not allow recovery to unimpaired plaintiffs, such as Pennsylvania and Kentucky, or allow recovery but apply a different test, such as New York.

In Pennsylvania the law is set out in *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), where all of the plaintiffs suffered from asbestos-related pleural thickening (the scarring of lung tissue). *Id.* at 236. The plaintiffs sought recovery for, *inter alia*, increased risk of cancer, fear of cancer, and mental anguish. *Id.* at 235. The Pennsylvania court held that asymptomatic pleural thickening is not a compensable injury that gives rise to a cause of action. *Id.* at 237. The general rule is that there can be no recovery for emotional distress absent physical injury or physical impact, and pleural thickening is not a sufficient impact. *Id.* at 238.

In Kentucky, mere exposure to a toxic substance does not constitute sufficient physical harm to base a claim for damages.

*Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 195 (Ky. 1994). Kentucky law requires a tangible injury to trigger the existence of a cause of action. *Id.* at 194. The fear of cancer cause of action would not accrue until the plaintiff had suffered a "harmful change." *Id.* at 193.

In New York, plaintiffs can maintain an action for "cancerphobia", but it requires different elements to be proved than under West Virginia law. Under New York law the plaintiff can recover if they can establish that they were in fact exposed to the disease-causing agent and that there is a 'rational basis' for the fear of contracting the disease. *Wolff v. A-One Oil, Inc.*, 627 N.Y.S.2d 788, 789 (2d Dep't 1995); *Dangler v. Town of Whitestown*, 672 N.Y.S.2d 188, 190 (4th Dep't 1998). In New York the rational basis is achieved through demonstrating a clinical presence of asbestos fibers in the lungs, or some indication of an asbestos-induced disease. *Wolff*, 627 N.Y.S.2d at 789. While New York and West Virginia both require proof of exposure, New York then looks for the physical presence of asbestos as compared to West Virginia law which focuses on the suffering of serious emotional distress as a direct result of the exposure.

The law on unimpaired plaintiffs is controversial because of the difficulty in proving harm and the high likelihood of sham claims. In the area of asbestos litigation the controversy is heightened because unimpaired claimants recovery of damages reduces the funds available for truly sick claimants. West Virginia's application of only its law means that it is imposing its method of resolving the controversy on all other states.

### C. The Application of Multiple States' Laws in the Mass Trial Creates Jury Confusion and Violates Due Process

Under normal circumstances West Virginia recognizes the doctrine of *lex loci delicti* ("place of the wrong") . *Vest v. St. Albans Hospital*, 387 S.E.2d 282, 283 (W. Va. 1989); *Paul v. National Life*, 352 S.E.2d 550, 555 (W. Va. 1986). Pursuant to this doctrine, "the substantive rights between the parties are

determined by the law of the place of the injury." *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913, 924 (W. Va. 1997).

If the West Virginia court applies the *lex loci delicti* doctrine correctly, the jury will be hopelessly confused and the procedure will violate due process. Variations among the applicable states' laws would exacerbate the multiplicity of issues to be determined during each phase of the trial and make the mass trial format all the more impracticable. In case after case, courts in mass tort actions involving plaintiffs from multiple states have held that (a) state tort laws differ materially on a wide range of issues, (b) such differences result in a lack of common issues, and (c) any joint trial (even of limited issues) would therefore be unmanageable and unfair. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-743 (5th Cir. 1996) ("[p]roducts liability law also differs among states," including the standards for strict liability and affirmative defenses); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) ("[t]he states have different rules governing the whole range of issues raised by the plaintiffs' [asbestos personal injury] claims"), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423-424 (E.D. La. 1997) (varying state law jury instructions for strict liability product defect claims "could not possibly be given to the same jury"); *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447 (finding that the prospect of applying the different laws of each of the relevant states to consolidated claims would "create a nightmare of jury confusion which would be prejudicial to [the parties]").

The application of solely West Virginia law is impermissible in an aggregation involving injuries that took place all over the country. Differences in state laws may be costly and increase complexity, "but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Tires Prods. Liab. Litig. Appeals*, 288 F.3d 1012, 1020 (7th Cir. 2002). In *Bridgestone/ Firestone* the plaintiffs obtained certification of nationwide class actions and sought to apply a single state's law (place of

defendants' headquarters) to the cases from all 50 states. *Id.* at 1015-16. The Seventh Circuit decertified the class because Indiana, the state where the Federal Court sat, is a *lex loci delicti* state and thus selects the law of the place where the harm (physical or financial) occurred. *Id.* at 1016. The Seventh Circuit found not only that applying a single state's law violated due process and federalism, but also that "adjudication under the law of so many jurisdictions . . . is not manageable." *Id.* at 1018, 1020.

Due process guarantees parties the right to present their case at a meaningful time and in a meaningful manner. *See* U.S. CONST. 5th and 14th Amendments; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1981); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). The confusion created by requiring a jury to apply numerous different state laws in one proceeding deprives all parties of their right to present their cases in a meaningful manner.

The reasoning in *Bridgestone/Firestone* applies equally to the "Mass Trial" of asbestos cases. If the trial court adopts only West Virginia law to simplify the trial, it violates the due process and federalism requirements of the United States Constitution, and if it seeks to apply the laws of the numerous states implicated in the case the trial will be unmanageable, confusing to the jury and ultimately a violation of due process. Therefore, West Virginia's attempt to aggregate thousands of disparate claims is inappropriate because in any conceivable form it violates the due process requirements of the United States Constitution.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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